



IN THE HIGH COURT OF KENYA AT NYERI

PETITION NO.3 OF 2016

IN THE MATTER OF ENFORCEMENT OF BILL OF RIGHTS ARTICLE 22,

AND

IN THE MATTER OF AUTHORITY OF COURT TO UPHOLD AND ENFORCE THE BILL OF RIGHTS UNDER ARTICLE 23

AND

IN THE MATTER OF RIGHT TO EDUCATION UNDER ARTICLE 43(1)F

AND

IN THE MATTER OF RIGHT TO FAIR HEARING UNDER ARTICLE 50

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION UNDER ARTICLE 47

AND

IN THE MATTER OF SECTION 63 OF THE UNIVERSITIES ACT

THANGARI LOISE MUKUHI.....PETITIONER

VERSUS

KARATINA UNIVERSITY..... RESPONDENT

RULING

INTRODUCTION

1. The Notice of Motion was brought by way of a Certificate of Urgency under Articles 22 and 23 of the Constitution of Kenya and is dated the 22nd day of January, 2016; the Petitioner (hereinafter referred to as the applicant) was expelled from the University due to examination irregularities and is seeking the following orders inter alia;

i. Spent

ii. That a conservatory order be issued against the respondent compelling them to reinstate and immediately re-admit the applicant as a student and to allow her all the benefits of a student until the Petition is determined by the court.

iii. The costs of the application be provided for.

PETITIONERS SUBMISSIONS

2. Counsel for the applicant relied on the supporting affidavit sworn on the 22nd day of January 2016.
3. That the respondent had employed an unqualified person as an invigilator to supervise the examination thereby occasioning the irregularities.
4. That disciplinary proceedings instituted by the respondent against the applicant took two (2) years and were not expedited within the statutory time frame of six (6) months set down for all public universities; the court was urged to find the confession of the lapse of 2 years amounted to an admission by the respondent and that there was a delay and that it failed to conform to the provisions of Section 63 of the Universities Act.
5. The two (2) year suspension meted upon the applicant by the respondent would jeopardize her sponsorship leading to her missing out on it; that the respondent will not be able to compensate her thus causing irreparable loss; further the two year suspension would constitute a life- long burden upon the applicant and would affect her career progression and also affect her CV as any potential employer would seek an explanation on the two year gap; this thus constituted irreparable damage to the applicant.
6. The applicant urged the court to intervene and save her by granting the conservatory order and to reinstate the applicant to enable her to enjoy her rights at this interim stage pending the hearing and determination of the petition.

RESPONDENTS SUBMISSIONS

7. The application was opposed and the respondent relied on the filed Replying Affidavit; that the conservatory order sought was couched in terms of a mandatory injunction which requires the applicant to demonstrate compelling and exceptional circumstances; That the applicant had not demonstrated that there was a denial of an opportunity to be heard or a lack of fairness of the process.
8. That any delay in the hearings contended to by the applicant was also occasioned by the applicants numerous requests for adjournments; that after the order for expulsion the applicant exercised her right to the appellate process; at the first hearing of the appeal the applicant also requested for an adjournment through her Counsel.
9. Counsel for the respondent urged the court to be fair and to find whether an arguable case had been made out on the issue of delay; and whether such delay was reasonable or inordinate.
10. On whether the applicant would suffer irreparable harm Counsel submitted that sponsorship was a monetary issue; that Section 11(j) of the Fair Administrative Action Act allows for pecuniary compensation; therefore this court could grant damages in pecuniary terms; also so as not to lose out on the sponsorship the respondent could also provide credit transfers to other universities.
11. The respondent impressed upon the court to consider whether anything will be left for the court to re-visit at the main hearing once the order sought is issued; that the petition would be rendered nugatory and an academic exercise.
12. The court was urged to make a finding that the order sought was not appropriate at this stage.

ISSUES FOR DETERMINATION

13. After hearing the parties respective submissions the only issue framed by this court for determination is whether a conservatory order is merited pending the hearing and determination of the Petition.

ANALYSIS

14. This court opines that there are certain violations of rights that are non-negotiable and incapable of being compensated by damages; but this is not the case in this instance and therefore in ascertaining whether the orders sought herein are merited this court shall make reference to the principles applicable to granting of injunctive orders in civil matters; the guiding principles are set down in the celebrated case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** which are as follows;

- i. The applicant must establish a prima facie case with a probability of success;
- ii. That the applicant must demonstrate they stand to suffer irreparable loss that cannot be compensated by way of damages;
- iii. If in doubt, the court can then make a decision on a balance of convenience.

Whether the applicant has made out a prima facie case

15. In this instance the applicant is asking the court to look at the administrative action of the respondent and whether it was delayed and was not in conformity with the statutory standards; under this principle the applicant herein must establish an arguable case to demonstrate that the delay was inordinate and the decision emanating there from violated her legal right to education and therefore she is deserving of the orders sought.

16. Upon perusal of paragraph 4 of the Petitioners Supporting Affidavit dated the 22nd January, 2016 the court notes that applicant has made the following averments:

“THAT the decision of the Board was unfair as they had waited too long to prosecute me on the alleged offence, yet they continued receiving my school fees and I also continued to do other examinations”

17. From the pleadings it is noted that the disciplinary proceedings were conducted by the Examinations Irregularities Committee and on the 11/09/2015 it was resolved that the applicant be expelled; the applicant thereafter proceeded to file an appeal on the 24th September, 2015 against the decision of the committee to the Universities Appeals Board; vide letter dated 26/10/2015 the applicant was informed by the Appeals Board that the hearing of the appeal was scheduled for the 10/11/2015; the appeals board then proceeded to hear the appeal in the presence of the applicant and its decision was communicated to the applicant on the 11/11/2015.

18. It is trite law that a party is bound by its pleadings and that a court must and can only exercise its discretion judiciously based on the material placed before it; therefore as deposed in the supporting affidavit the assumption derived therefrom is that the applicant was aggrieved with the time taken by the Board in rendering its decision; going by the letters alluded to hereinabove this court has noted that within a time frame of three (3) months or less the Appeals Board had heard the appeal and rendered its' determination; that being the case this court finds that the applicant has failed to demonstrate a prima facie case on the issue of delay and failure to adhere to the statutory

19. time frames.

20. On this principle this court is not satisfied that the applicant has not established a prima facie case against the respondent.

Whether the applicant will suffer irreparable loss that cannot be compensated by damages

21. The applicant states that the Kieni CDF is her sponsor and that the respondents decision poses a real threat to her sponsorship as she stands to lose it; that it would be in her best interest if the order sought was granted otherwise she stands to suffer irreparable injury;

22. This court concurs with the respondents submission that the sponsorship is a monetary issue; this court opines that the Kieni CDF must have set aside a specific sum towards payment of the applicants fees for the year 2016 thus the value of this right is an amount that is quantifiable in monetary terms;

23. This court is satisfied that the order sought would not be an appropriate remedy as the applicant has not satisfied the court that she will suffer irreparable damage that cannot be compensated by damages if the conservatory order is not granted.

The balance of convenience tilts in whose favour;

24. The order sought for reinstatement is not an ideal order at this stage as it would amount to an interlocutory mandatory injunction and by granting such an order this court would in effect be making a final determination of the main petition as opposed to maintaining a status quo. This court is persuaded by the decision of Musinga J in the case of **CREAW & Others vs The Attorney General [2011] eKLR** where the Judge stated that;

“ ...The court must be careful for it not to reach final conclusions and to make final findings. By the time the application is decided, all the parties must still have the ability and flexibility to prosecute their cases and present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either parties....”

25. In this instance what should be taken into consideration is in the event the Petition fails what other recourse would be available to the respondent if the applicant is allowed to go back at this juncture; will the subject matter of the case be lost and the matter be rendered nugatory; it is my considered view that at the juncture of an interlocutory application the court should not be called upon to make a determination that has a finality; there may have been a violation of the petitioners rights but there are also other triable issues like the degree of contribution by the applicant; the integrity of the whole process needs to be interrogated and all the parties ought to be given a fair chance to be heard and this can only be done at the hearing of the main petition.

26. I shall say no more and shall only add that the balance of convenience tilts in favour of the respondent.

FINDINGS AND DETERMINATION

27. For the reasons stated above this court finds that this is not a suitable case for the issuance of the conservatory order.

28. The application is hereby dismissed.

29. The court thanks Counsels for their in depth presentations and the authorities cited. The Petitioner is hereby directed to list the Petition for hearing and determination on a priority basis for its early determination.

30. The Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 7th day of April 2016.

JUDGE

A.MSHILA